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FLASH REPORT

Country:	France
Title:	Court of Cassation, Social chamber, 3 April 2019, n° 17-11970
Date:	24 June 2019
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<u>Context</u>	
Issue at stake:	Burden of proof of claimants challenging the legality of differential treatment between employees resulting from collective and negotiated agreements
Grounds of discrimination:	All grounds
Field of application:	All fields
Source:	National court decision

Content

Case: Further to the regrouping of two working sites by the regional agricultural credit bank (CRCAM), the employer put in place benefits for employees who had accepted mobility to a particularly remote site. This benefit was enshrined in a collective agreement, in which there was a clause providing that it was reserved to employees who had been transferred before June 2011. The claimant, who was employed by the bank since 1997, was transferred to this site in August 2012 and was denied this benefit.

The first instance court dismissed her claim on the basis that the provision resulted from an agreement negotiated with the representative trade union.¹

The Court of Appeal applied the long-standing jurisprudence² stating that in case of a negotiated agreement, the claimant has the burden to establish that the differential treatment created arbitrary differences in treatment of persons in comparable situations that was foreign to any professional consideration. It decided that the claimant had satisfied this burden and granted the appeal.

Decision of the court: Further to the recourse of the Bank (CRCAM), the Court of cassation dismissed the recourses and decided to put aside the illegal provision. In a very detailed reasoning, which is exceptional for the Court of cassation, it expressly revisited its position regarding the presumption of validity of negotiated agreements and the burden of proof of the claimant in cases challenging the conformity to the principle of equality of differential treatment between employees resulting from collective and negotiated agreements.

¹ While the claimant did not invoke non-discrimination legislation, the finding of the Court is directly applicable and relevant for discrimination cases.

² Court of Cassation, Social chamber, 1 July 2009, n° 07-42675; Court of Cassation, Social chamber, 27 January 2015, n° 13-22179.

The Court decided that such a presumption imposed a burden on the claimant that was contrary to requirements of EU law as provided by the jurisprudence.³ Hence, it does not apply in cases relating to areas of competence of EU law, such as the principle of equal treatment, the principle of non-discrimination as provided by the EU directives, and freedom of circulation.

The Court therefore concluded that mobility benefits raised issues relating to the free circulation of workers within the EU and that the employer had the burden to establish that the principle of non-discrimination had not been violated.

Key points of analysis: In promoting the value of social dialogue as protected by the Constitution, the Court of cassation had previously developed a presumption of justification of negotiated agreements to attribute special value to negotiated contractual provisions. Its doctrine was based on the view that differential treatment between employees resulting from collective and negotiated agreements were presumed to satisfy the principle of equality as they resulted from negotiation and signature by representative trade unions, invested with the defense of the rights and interests of workers, to the election of which they participate by their vote.

The Court of cassation has overturned this position for all provisions that have an implication in EU Law, among which the principle of Equal treatment and non-discrimination within the purview of EU law.

In express submission to the requirements of EU law as applied by the CJEU jurisprudence, the Court subordinates the superiority of negotiation to the superior protection of principles of equal treatment and non-discrimination as protected by EU law.

Some authors consider that this case announces a recognition by the Court of the fact that all workers are not equally protected by trade union negotiations and of the vulnerability of certain discriminated groups.

The limitation of the presumption of validity of negotiated agreements in this case is not intended to affect certain forms of differential treatment in collective bargaining such as those between managers and non-managers (cadres & non cadres) which could potentially foster indirect discrimination based on sex.

Internet link source:

<https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000038373553>.

³ The Court of Cassation referred notably to the CJEU judgments in cases C-406/15, *Milkova* of 9 March 2017; C-313/02, *Wippel* of 12 October 2004; and C-414/16, *Egenberger* of 17 April 2018.